

267  
R.M. Hudson for Appellant  
M.G. Otis

**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1924**

**No. 74** >

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**MAX M. HOROWITZ, APPELLANT,**

**vs.**

**THE UNITED STATES**

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**APPEAL FROM THE COURT OF CLAIMS**

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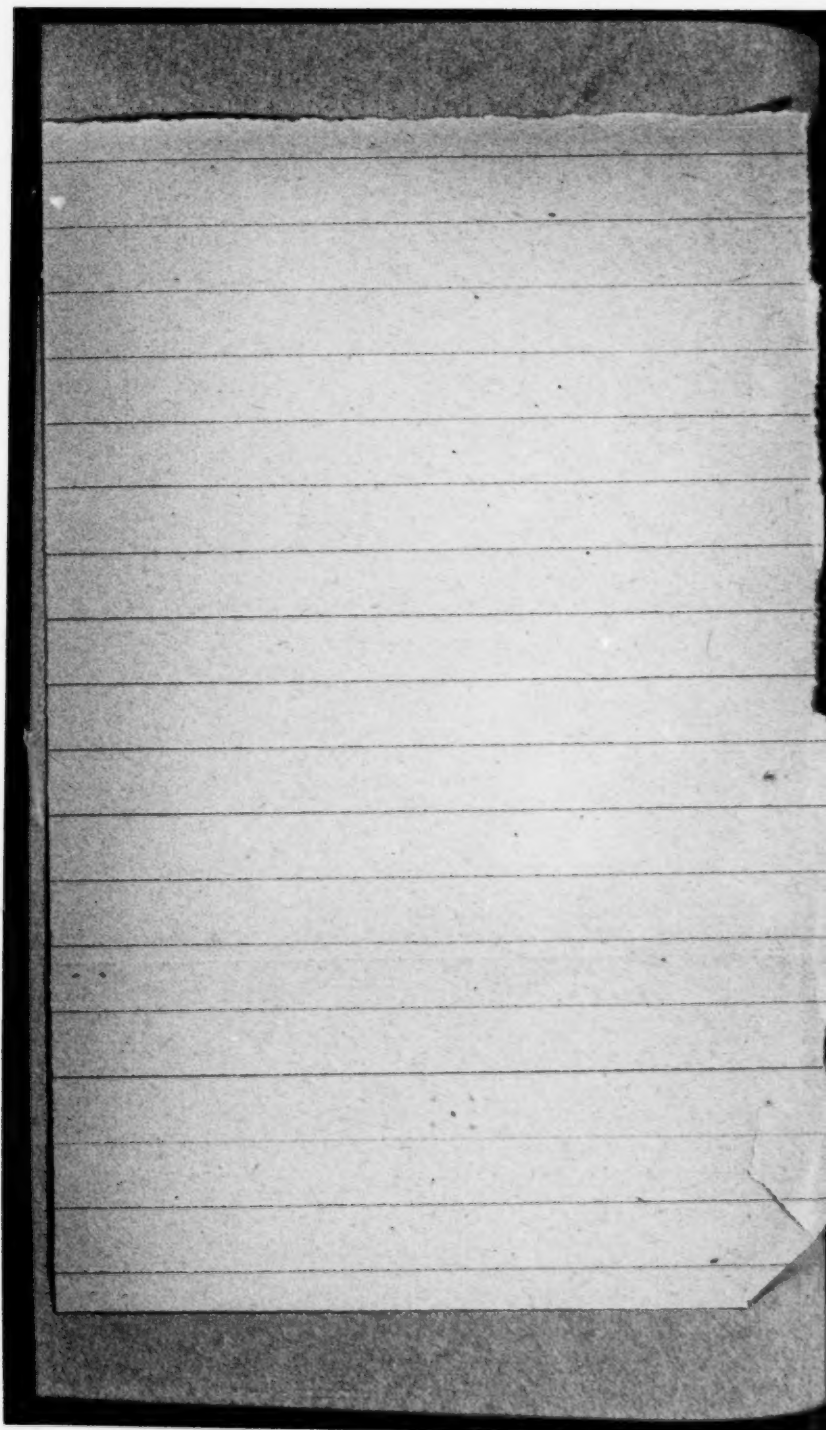
**FILED MAY 19, 1925**

**(29,652)**

Ex parte alleged ground  
of recovery  
=

Remains to be completely sustained - PWT officials  
Paragraphs 6 & 7 when read to-  
gether present the embargo as  
the breach of contract by the  
U.S. and the sole ground  
on which recovery is  
claimed. This ground  
is not good - Dunham v  
1 C.C. 190 - Joseph Wilson v U.S.  
11 C.C. 513. 521  
U.S. v Mikopolitza number 20  
254 Fed. 335, 357

An allegation that an em-  
bargo had been placed on the  
shipment of steel by freight  
and that thereby the shipment  
was held up i.e. failure to  
ship because of the embargo  
does not state ~~the~~ Actable  
breach of contract.



(29,652)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 345

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MAX M. HOROWITZ, APPELLANT,

*vs.*

THE UNITED STATES

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APPEAL FROM THE COURT OF CLAIMS

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33,433

8664  
62  $\frac{1}{2}$

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4332  
17328  
51984

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5415 00

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[fol.1]

IN THE

## UNITED STATES COURT OF CLAIMS

No. C-13

MAX M. HOROWITZ

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed January 23, 1923

The claimant, Max M. Horowitz, respectfully represents:

1. That he is a citizen and resident of the State of New York and is a dealer in silk.

2. That the original contract or agreement is not in the possession of the claimant, but is in the Ordnance Department of the War Department; that on or about December 20, 1919, claimant negotiated for and bid on certain Habutai silk, hereinafter described, a copy of which bid is hereto annexed, marked Exhibit A-1, and made a part hereof, and on the 22nd day of December, 1919, the Ordnance District Salvage Board, having then an office at 1107 Broadway, New York, N. Y., through its chairman of Committee on Sales of [fol. 2] Materials, notified claimant in writing, who then was in New York, that the Washington Ordnance Salvage Board had on that day approved the sale to claimant of certain domestic silk Habutai described and at the prices next hereinafter set forth:

New York District Serial No. 1503—36"

Habutai, manufactured by Rossell, located at Washington, D. C. . . . . 8,664 yds. @ 62 $\frac{1}{2}$ ¢

New York District Serial No. 1500—45"

Habutai, manufactured by Duplan, located at Washington, D. C. . . . . 33,433  $\frac{6}{8}$  yds. @ 77 $\frac{1}{2}$ ¢

New York District Serial No. 1504—45"

Habutai, manufactured by Rossel, located at Washington, D. C. . . . . 42,229 $\frac{3}{8}$  yds. @ 77 $\frac{1}{2}$ ¢

that thereupon the claimant paid the government \$5,000.00 and again on February 6, 1920, paid the government another \$5,000.00.

3. That at the time claimant bid on such silk and at the time he made such partial payments and prior thereto, and as a part of the consideration for the sale of such silk, it was understood and agreed by and between E. A. Luthy, Chief of the Textile Division of New York City, on behalf of such Board, that Claimant need not pay for such silk until about the middle of February as claimant was moving from his old place of business to the above address and did not have accommodations to store such silk and purchased the same with the understanding that he should be given opportunity to resell such silk without being required to put up the entire amount of the purchase price. That said Luthy knew that the market price of silk

fluctuated and said Luthy promised and agreed that if claimant would buy this silk that his department and other departments of the Government having jurisdiction in matters of this kind would ship such silk within a day or two after shipping instructions were [fol. 3] given by claimant to him, and upon February 10, 1920, claimant notified said Luthy verbally and in writing that he was about to give him shipping instructions and to pay the balance of the purchase price as agreed for such silk. That such notification was intended to and did give notice to said Luthy and said Board that they must take steps preparatory to shipping such silk from Washington where such silk was then located.

That on or about six days after such time and on the 16th day of February, claimant paid the balance of the purchase price and notified such Board in writing to ship such silk by freight, insured for the sum of \$75,000, with bill of lading made in favor of the Cambridge Silk Company, care of Joseph Schultz & Bros., 45 East 17th Street, New York, and to have such silk shipped at once, and the bill of lading forwarded to your petitioner; that in such notice, dated February 16th, claimant requested that such silk be shipped at once, and was informed by E. A. Luthy, Chief of Division of Textiles, of such Board, that such silk would be shipped on the 16th or 17th day of February, 1920, and thereafter and on February 18th such Board notified claimant, in writing, that it had received such instructions dated February 16, 1920, and that such Board had ordered such silk shipped to the Cambridge Silk Company, care of Joseph Schultz & Bros., by freight, collect, to be insured for \$75,000.

4. That after December 22, 1919, and prior to the giving of shipping instructions by claimant, claimant received three sample cases of such silk and sold such silk to the consignee above named, but before doing so was told by E. A. Luthy, Chief of the Textile Division, that all of such silk would be packed and placed in a condition for prompt and immediate shipment and E. A. Luthy knew that the silk market has a tendency to fluctuate and that time was [fol. 4] the essence of the sale made by petitioner to such consignee, and claimant would not have made such sale to such consignee had he known or been informed by such Board, or any one representing the Government, that such silk could not be forthwith shipped by freight from Washington to New York.

5. That from February 16, 1920, up to March 4, 1920, such silk was not shipped as promised, nor was claimant informed until March 4th that such silk had not been shipped; that such silk was sold by claimant to such consignee on or about the 31st day of January, 1920, and from such date until March 4, 1920, the price of such silk declined about 25 per cent in the New York market. That such consignee was willing to take delivery of such silk soon after February 16, 1920, but such silk did not arrive in New York until on or about March 12th, at which time such consignee refused to take delivery, and a refusal notice from the American Railway Express Company, dated March 12th, was sent from the office of such company to the Salvage Board, Washington, D. C.



6. That such silk was sold by such board to claimant upon the express agreement and understanding that such silk was to be placed promptly free on board cars at Washington and that petitioner should be promptly notified of such shipment, and that the bill of lading should be forthwith delivered to claimant; that claimant was not notified of the shipment as ordered, and after considerable inquiries, phone calls, letters and telegrams, claimant learned on March 4th, 1920, that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up, and afterwards the Government shipped the said silk to the consignee, by express, but same was refused [fol. 5] because of the delay of the Government of the drop in prices.

7. That by reason of the Government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for \$10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time, which amount of \$10,811.84 claimant is now suing for as justly due and owing to him by the United States.

8. That the claimant is sole owner of the claim set forth in this petition, no assignment or transfer of the same or any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on account of the violation of the said agreement the sum of \$10,811.84 after allowing all credits and set-offs. The claimant has at all time borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

Wherefore, the Claimant prays judgment against the United States of America in the sum of \$10,811.84 and for such other and further relief as this Honorable Court might grant, both at law and in equity, in the premises.

Max M. Horowitz.

STATE OF NEW YORK,

City and County of New York:

To wit: I, Max M. Horowitz, being duly sworn, depose and state that I am the claimant in the foregoing suit, and that I read and subscribed the above petition and the facts stated therein are true to the best of my knowledge, information and belief.

Max M. Horowitz.

[fol. 6] Subscribed and sworn to before me this 22nd day of January, 1923. Given under my hand and official seal this 22nd day of January, 1923. Thomas F. Hand, Notary Public for the City and County of New York and State of New York. Raymond M. Hudson, Attorney for Claimant, Continental Trust Bldg., Washington, D. C.



## EXHIBIT A-1 TO PETITION

New York Ordnance Salvage Board

1107 Broadway, New York City

Division of —.

To: —.

The New York Ordnance Salvage Board is interested in the disposal of the material as listed below:

Bids for this material are invited, previous to — —, —, with the understanding that the Government reserves the right to reject any and all offers.

Statement of conditions is given from best information obtainable, but no guarantee can be given on behalf of the Government.

Material: White Habutai Silk.

Lot No. —.

I bid the following:

Quantity	Specifications	Location
8,664	yards 36" @ 62½ per yard	f. o. b. Washington.
33,433 6/8	yards 45" @ 77½ per yard	f. o. b. Washington.
42,229 3/8	yards 45" @ 77½ per yard	f. o. b. Washington.

For White Habutai Silk.

[fol. 7] Terms: —.

By order of Major W. J. Griden, Chairman Ordnance District Salvage Board.

To Ordnance District Salvage Board,

1107 Broadway, N. Y. C.,

Division of — &amp; —.

GENTLEMEN:

I, the undersigned, representing —, desire to purchase the material listed above at the price of —, and according to these terms: —.

The following information is requested:

Pre-war price: —. Present Market Price: —. Price of last known sale: —.

I hereby certify that I am not interested directly or indirectly in any person, firm or corporation bidding on this material except the one herein named.

Max M. Horowitz.

Date: Dec. 20/19.

(Fill in both—return original to N. Y. D. Salvage Board, 1107 Broadway, N. Y. City.)

Bid form No. 1.

[fol. 8]

## IN THE COURT OF CLAIMS

## II. DEFENDANT'S DEMURRER—Filed Feb. 14, 1923

Defendant demurs to the petition in this case for the reason it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. D. E. Rorer,  
W. F. Norris, Attorneys.

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 IN THE COURT OF CLAIMS

## III. ARGUMENT AND SUBMISSION OF DEMURRER

On March 5, 1923, the demurrer in this case was submitted without argument by Messrs. D. E. Rorer and W. F. Norris, for the defendant, and argued and submitted by Raymond M. Hudson, Esq., for the plaintiff.

[fol. 9]

## IN THE COURT OF CLAIMS

## ORDER SUSTAINING DEMURRER

This case came on to be heard upon the demurrer of the defendant to the plaintiff's petition. On consideration whereof the court is of opinion that the said demurrer is well taken. It is therefore adjudged and ordered by the court, That the defendant's said demurrer be and the same is hereby sustained, and the petition is dismissed.

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 MEMORANDUM BY THE COURT

The petition in this case does not allege a cause of action. It is nowhere alleged that the embargo established was in anywise contrary to law, and it does not appear that the defendant otherwise failed to observe its obligations under the contract of sale. The plaintiff directed the manner of shipment, and specifically pointed out how it should be carried out. The defendant in good faith endeavored to comply with the plaintiff's directions, but was forestalled in so doing by the establishment of an embargo, and it will not avail the plaintiff to simply allege the fact of the existence of an embargo established by the United States Railroad Administrator. No authorities have been cited to sustain the plaintiff's contention. The case is governed by the principles discussed in Deming's Case, 1 C. Cls. 190.

[fol. 10]

## IN THE COURT OF CLAIMS

## V. JUDGMENT OF THE COURT—Entered Mch. 19, 1923

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By the Court.

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 IN THE COURT OF CLAIMS

## VI. PLAINTIFF'S APPLICATION FOR APPEAL—Filed April 18, 1923

Now comes the plaintiff and moves the Court to allow him an appeal to the Supreme Court of the United States from a judgment of this Court entered on March 19, 1923.

Raymond M. Hudson, Attorney for Plaintiffs.

## IN THE COURT OF CLAIMS

## VII. ORDER OF COURT ALLOWING APPEAL

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

Entered April 30, 1923.

[fol. 11]

## COURT OF CLAIMS

[Title omitted]

## CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled case; of the argument and submission of demurrer; of the order and memorandum entered by the Court; of the judgment of the court; of the plaintiff's application for appeal and of the order of the Court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Third day of May, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,652. Court of Claims. Term No. 345. Max M. Horowitz, appellant, vs. The United States. Filed May 29th, 1923. File No. 29,652.